

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Cause No. C15-0543RSL

ORDER GRANTING IN PART
PLAINTIFF'S MOTION TO
EXCLUDE REBUTTAL
OPINIONS OF MICHAEL
BARANOWSKI

This matter comes before the Court on "Plaintiff's Motion to Partially Exclude Expert Testimony of Michael Baranowski." Dkt. # 232. Plaintiff argues that certain opinions set forth in Mr. Baranowski's rebuttal report were not timely disclosed, are speculative, and/or are irrelevant. Having reviewed the expert reports and the memoranda submitted by the parties, the Court finds as follows:

A. Timeliness of Disclosures

Plaintiff's expert, Daniel L. Fapp, opined in December 2023 that 100% of the net profits received for transporting rail cars from North Dakota to the March Point refineries was profit

1 arising from the unlawful use of Reservation lands¹ and that net profits are calculated as BNSF
2 does it internally, by subtracting the variable costs of a particular rail movement from the net
3 revenues generated thereby. Dkt. # 231 at 15 and 18-21. Mr. Baranowski simultaneously opined
4 that the net profits attributable to the trespass were only a small percentage of the total received
5 (providing three alternative calculations centered largely on the fact that the Easement covered
6 less than a mile out of the 1,500 mile movement) and that net profits must take into account not
7 only variable costs, but also fixed costs, interest, and income taxes. Dkt. # 236-1 at 8-9 and 12-
8 18. Given the stark differences of opinion regarding both matters, it is not surprising that Mr.
9 Baranowski felt the need to offer an alternative, compromise assessment of the profits
10 attributable to the trespass and to show that BNSF internally estimated the capital costs that
11 would be incurred if it agreed to provide rail service from North Dakota to Fidalgo Bay. While
12 the line between opening and rebuttal testimony is not always clear, Mr. Baranowski's "new"
13 opinions go to specific aspects of Mr. Fapp's analysis and can properly be considered as
14 rebuttal.

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20 Plaintiff also argues that admission of the opinions will prejudice the Tribe because it has
21 not had an opportunity to address or otherwise rebut them. The facts that BNSF made estimates
22 of the capital improvements that would be necessary to provide the service Tesoro requested and
23 that Bakken crude oil can be transported to the March Point refineries without crossing the
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27 ¹ Plaintiff asserts that Mr. Fapp offered no opinions regarding apportionment, but the logical
28 inference arising from his statements is that no apportionment is appropriate.

Reservation were known at the time of the liability trial in March 2023.² The fundamental nature of the experts' disputes regarding allocation and the calculation of net profits has been clear for months, as have the issues that will be decided by the Court in this phase of the litigation. Both experts will testify at trial and will have the opportunity to address rebuttal arguments and respond to questioning from counsel and the Court. While any opinions or clarifications offered in rebuttal contain some element of surprise, in the circumstances presented here, plaintiff is not prejudiced by consideration of Mr. Baranowski's discussions of alternative routes and capital charges.

B. Relevance and Reliability

Plaintiff argues that, even if Mr. Baranowski's rebuttal opinions were timely disclosed, his opinions regarding alternative routes are speculative and all of the challenged opinions are irrelevant. Federal Rule of Evidence 702 provides that expert testimony is admissible if:

(1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert has reliably applied the relevant principles and methods to the facts of the case.

City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1043 (9th Cir. 2014). As construed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 tasks a district judge with "ensuring

² As discussed below, Mr. Baranowski's opinion that Bakken crude transportation is entirely fungible, such that BNSF would have found some other refinery to take the same volume and pay the same price, is speculative and unreliable. The Court therefore need not resolve the issue of whether the introduction of that opinion into evidence would cause prejudice.

1 that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."
2 509 U.S. 579, 597 (1993). Scientific evidence is reliable when "the principles and methodology
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4 used by an expert are grounded in the methods of science." *Clausen v. M/V New Carissa*, 339
5 F.3d 1049, 1056 (9th Cir. 2003). But "[t]he inquiry envisioned by Rule 702 is ... a flexible one,"
6 and where an expert offers non-scientific testimony, "reliability depends heavily on the
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8 knowledge and experience of the expert, rather than the methodology or theory behind" the
9 testimony. *Porter v. Martinez*, 64 F.4th 1112, 1127 (9th Cir. 2023) (quoting *Daubert*, 509 U.S.
10 at 594, and *Hangerter v. Provident Life & Acc. Ins. Co.*, 373 F. 3d 998, 1017 (9th Cir. 2004)).
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12 The analysis "should be applied with a 'liberal thrust' favoring admission." *Messick v. Novartis*
13 *Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (quoting *Daubert*, 509 U.S. at 588).

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15 Ultimately, the test under *Daubert* is not the correctness of the expert's
16 conclusions but the soundness of his methodology. The court is a gatekeeper, not a
17 fact finder. Accordingly, the district court is not tasked with deciding whether the
18 expert is right or wrong, just whether his testimony has substance such that it
19 would be helpful to a jury. If the proposed testimony meets the thresholds of
20 relevance and reliability, its proponent is entitled to have the jury decide upon its
21 credibility, rather than the judge. Challenges that go to the weight of the evidence
22 are within the province of a fact finder, not a trial court judge. A district court
23 should not make credibility determinations that are reserved for the jury. This
24 Court has previously noted that shaky but admissible evidence is to be attacked by
25 cross examination, contrary evidence, and attention to the burden of proof, not
26 exclusion.
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1 *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (internal quotation marks,
2 citations, and alterations omitted).³ “Basically, the judge is supposed to screen the jury from
3 unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.”
4 *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70 (9th Cir. 2013).
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6 **1. Other Markets for Bakken Crude Oil**

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8 Mr. Baranowski opines that “the market for crude oil was dynamic” from 2012 to 2021,
9 and in an alternative universe where BNSF complied with the terms of the Easement, it “likely
10 would have negotiated for a contract that would have allowed [it] to deliver the crude oil to an
11 alternative destination in its rail network.” Dkt. # 236-3 at 19-20. In Mr. Baranowski’s
12 estimation, then, “[t]he profits BNSF earned on unit train crude oil shipments to other
13 destinations provides an appropriate benchmark for the profits BSNF would have realized in the
14 absence of the trespass.” Dkt. # 236-3 at 19.
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17 No support is offered for any of these statements: there are no citations to industry
18 publications or statistics, no analysis of BNSF or refinery capacity during the relevant time
19 frame, and no evidence of unmet service requests. What we do know is that BNSF contracted to
20 provide transportation services to the Tesoro refinery at March Point, and the profits at issue
21 arose out of those agreements. Mr. Baranowski does not identify another Tesoro refinery that
22 had the capacity to take the volume of crude that was shipped to Fidalgo Bay, and the fact that
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26 ³ Of course, in this case, the Court is both the gatekeeper and the trier of fact. As such, the
27 undersigned has a dual role in first assessing the admissibility of expert testimony and later assessing the
28 credibility of the expert and the weight to be given his testimony.

1 Tesoro felt the need to build unit train off-loading facilities at its March Point refinery suggests
2 that capacity elsewhere was insufficient. Nor does Mr. Baranowski identify another oil company
3 that had requested transportation services from the Bakken formation but had been refused
4 because BNSF lacked capacity. The fact that BNSF transported crude oil to destinations other
5 than Fidalgo does not tend to show that crude could simply have been shipped somewhere else
6 or that BNSF would have earned the profits at issue in this case (or some unstated portion
7 thereof) even if Tesoro had not requested service to its March Point refinery. While absolute
8 certainty is not required, expert opinions must be based on “sufficient facts or data” to allow the
9 formation of a reliable conclusion as opposed to conjecture or speculation. Fed. R. Ev. 702(3).
10 Mr. Baranowski’s opinion that the profits generated from the North Dakota to Fidalgo Bay
11 service were not causally related to the trespass because BNSF could have and would have
12 shipped the crude oil elsewhere does not meet this standard and is inadmissible.

17 **2. Non-Trespassing Means of Transporting Crude to Fidalgo Bay**

18 Mr. Baranowski further opines that BNSF could have offered Tesoro an alternative route
19 for getting Bakken crude oil from North Dakota to Fidalgo Bay, one which would not involve
20 crossing the Easement but which would have reduced BNSF’s net profits by slightly more than
21 \$200 per car.⁴ This opinion is based on what actually happened in 2021 when BNSF stopped
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26 ⁴ The rebuttal report asserts that the reduction in net profits would have been 20% if the unit
27 trains stopped at the Columbia River and the crude were loaded onto barges for the last leg of the
28 journey. At page 20 of the rebuttal report, Mr. Baranowski provides net profit per car data from 2021
which works out to a reduction of profits of \$204 per car ($\$1,031 - \$827 = \204). At page 18, however,

1 trespassing over the Easement. Mr. Baranowski's calculations, while subject to cross
 2 examination and possible corrections if barge and rail costs varied throughout the decade of the
 3 trespass, are based on facts and data, are not speculative, offer a reliable means of showing the
 4 portion of the profits that were attributable to the trespass as opposed to the lawful use of rails
 5 connecting the Bakken formation to the Columbia River, and are clearly relevant to the issue of
 6 apportionment.
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9 **3. Capital Charges**

10 In response to Mr. Fapp's assertion that BNSF uses its ABS data to evaluate the revenues
 11 and variable costs associated with a given movement (Dkt. # 231 at 19), Mr. Baranowski points
 12 out that when contemplating prospective new business, BNSF estimates the capital that would
 13 be consumed in providing the requested rail service as part of its decision-making process (Dkt.
 14 # 236-3 at 9-10). The relevance of this information is minimal. Estimates of expenses generated
 15 while a new business opportunity is being evaluated may or may not be accurate.⁵ Absent some
 16 evidence of the capital expenditures that were actually incurred as part of servicing the March
 17 Point refineries, the fact finder would have to speculate as to appropriate deductions from gross
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23 he asserts that the 2021 net profit per car was \$1,058, which works out to a reduction of profits of
 24 \$211.60 per car ($\$1,058 \times .2 = \211.60).

25 ⁵ Evidence presented in the Phase I trial showed that BNSF initially estimated that transporting
 26 Bakken crude from North Dakota to Fidalgo Bay would require approximately \$5 million in capital
 27 expenditures and generate annual revenues of approximately \$65-\$75 million. Mr. Baranowski,
 28 however, asserts that BNSF anticipated \$161.6 million in capital expenditures attributable to the unit
 train shipments to Fidalgo. Dkt. # 236-4 at 9. The average annual revenue that was actually earned from
 the shipments was \$97 million. Dkt. # 236-3, Table 4.

1 revenues. More importantly, regardless of the accuracy of BNSF's predictions, only the variable
2 or marginal costs of capital are relevant to the calculation of net profits. *See* Order Regarding
3 Motions for Summary Judgment at 6-9. BNSF asserts that capital charges are one of the
4 elements incorporated into the ABS system, and neither it nor Mr. Baranowski has identified
5 any capital cost or portion thereof that varied with each unit of production but was not included
6 in the ABS system. Because it appears that any marginal capital costs have already been
7 considered in Mr. Fapp's calculations of net profits, Mr. Baranowski's general assertions
8 regarding how BNSF considers capital costs when evaluating prospective new business are
9 unhelpful.
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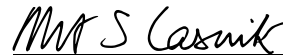
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1 For all of the foregoing reasons, plaintiff's motion to exclude the rebuttal opinions of Mr.
2 Baranowski is GRANTED in part and DENIED in part. Mr. Baranowski may testify regarding
3 the net profits that would have been realized had BNSF avoided the Easement and off-loaded
4 the Bakken crude at the Columbia River from 2012-2021. He may not, however, speculate
5 regarding BNSF's ability to service other refineries had it never agreed to carry Bakken crude to
6 Fidalgo Bay, nor may he opine regarding capital cost estimates that were not actually incurred
7 and do not reflect the variable or marginal costs of carrying crude to the March Point refineries.
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11 Dated this 20th day of May, 2024.
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15 Robert S. Lasnik
16 United States District Judge
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